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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 134

DREXEL & CO., and others,

Petitioners,

v.

GEORGE HALL, and others,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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New York, June 8, 1965.

INDEX

	PAGE
Question Presented	1
Objections to Petitioners' Statement of the Case	2
Reasons for Denying the Writ	4
Argument	4
(a) There is no conflict between decisions of state courts and this Court	4
(b) There is no conflict between circuits	5
(c) There is no question of state or territorial law involved	6
(d) There is no question requiring settlement by this Court	6
(e) There is no decision below in conflict with decisions of this Court	7
(f) The decision below does not depart from usual and accepted practice	7
Conclusion	10

Table of Cases

Weeks v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941)	3
Athas v. *Day*, 161 F. Supp. 916 (D. Col., 1958)	5, 6
Union Carbide and Carbon v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), petition dismissed 371 U. S. 801	5, 6
Husserl, Inc. v. *Newman*, 25 FRD 264 (S.D. N. Y., 1960)	6
York v. *Guaranty Trust Co.*, 143 F. 2d 503 (2nd Cir. 1944), rev'd on other grounds 326 U. S. 99	6

Other Authorities

PAGE

Multi-Party Litigation in the Federal Courts, 71 Harv. Law Rev. 874, 934-936 3

Advisory Rules Committee Report, 34 FRD 385 ..... 3, 6

Securities Act of 1933

§11, 15 U. S. C. §77k 4, 7, 8

§13, 15 U. S. C. §77m 4, 9, 10

Fed. Rules of Civ. Proc., Rule 23 ..... 3, 6, 7

76 Harv. Law Rev. 1675-1679 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1160

DREXEL & Co., and others, *Petitioners,*

v.

GEORGE HALL, and others, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

When a class action has been timely brought, may members of the class join that action by intervention, even though the applicable statute of limitations would prevent them from instituting a separate action?

Statement

It is Respondents' position that the institution of a class action, if timely brought, complies with the statute of limitations for all members of the class. The action having been brought on behalf of the entire class, any member of the class who subsequently becomes a plaintiff by intervention is deemed to have brought his action at

the time of the commencement of the class action. We do not contend that the statute has been so "tolled" that another independent action could be started without compliance with the statutory time limitation.

The phrase "tolling of the statute of limitations" as used in discussions of class actions does not have its usual meaning. Ordinarily "tolling" of the statute of limitations takes place before an action is commenced, and in the usual sense what is meant by "tolling of the statute of limitations" is that the period within which the action may be commenced is enlarged. When used in its present context the phrase "tolling of the statute of limitations" does not mean that the period within which the action may be commenced is enlarged, but only that if a class action was timely brought, members of the class for whose benefit it was brought may later intervene.

Throughout the writings on the subject of class actions the expression "tolling of the statute of limitations" has been used with the above connotation. For the purpose of consistency of expression, we will also use it herein with that meaning.

Objections to Petitioners' Statement of the Case

On page 5 of Petitioners' brief it is stated that there is no evidence that other security holders were associated in any way with the nine (original plaintiffs) or that the nine had any authority to represent any security purchasers other than themselves. This is an incorrect statement. All of the security holders have a relationship to each other in that all purchased their securities after the alleged false registration statement was filed and after the alleged false prospectus was disseminated.

They are all purchasers under a single registration statement of a single issue of debentures of the BarChris Construction Corporation represented by a single Trustee under a single Trust indenture. All are members of a single, clearly identifiable class. The authority of the original plaintiffs to act on behalf of the class is found in Rule 23.

Speaking of this action, Judge Hays, below, 340 F. 2d 731, 733, said:

> "It falls squarely within the terms of Rule 23(a)3 since there are questions of law and fact which are common to all the claims asserted. In fact the question of the falsity of the registration statement is almost certain to be the real issue in the litigation. * * * The Advisory Committee's Note on the proposed amendment to Rule 23 suggested that the kind of situation we have here, 'a fraud perpetrated on numerous persons by the use of similar misrepresentations,' is an 'appealing situation for a class action'."[1]

The original plaintiffs and the Respondents cannot be said, as Petitioners' urge, to be without association of any kind when they are: all purchasers of the same security issued under the same allegedly false Registration Statement; are victims of the same fraud; and, are all present or former holders of a single debenture issue. (*Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 7th Cir. 1941; Multi-Party Litigation in the Federal Courts, 71 Harv. Law Rev. 874, 934-936.)

On page 6 of Petitioners' brief, statements are made that it is an essential allegation of the proposed third

1. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, page 107 (1964).

amended complaint that those who seek intervention have not discovered, or by reasonable diligence could not discover, the falsity in the registration statement more than one year prior to the date of *the motion to intervene.* This is inaccurate. All that intervenors must establish is that the falsity in the registration statement was not, or could not reasonably have been, discovered more than one year prior to the date of the *commencement of the action.*

Reasons for Denying the Writ

The decision below is not in conflict with any decision of any court of appeals. It is not in conflict with state or territorial law. It does not raise a question which need be settled by this court. The decision below is not in conflict with any decision of this court; nor has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The decision below has not abrogated the statute of limitations contained in Section 13 of the Securities Act of 1933.

Argument

None of the usual reasons for review on certiorari are present in this case.

(a) No state court has decided a federal question which has not been decided by this Court, or decided a federal question in a way not in accord with the decisions of this Court.

This is a federal court action brought under a federal statute (Section 11 of the Securities Act of 1933). We know of no state court decisions on the question here

involved and consequently believe that there are no state court decisions with which this Court need be concerned.

(b) The court below, in deciding this case is not in conflict with the decisions of any courts of appeal in other circuits.

As Judge Hays pointed out, at page 734 of the opinion below, there are only two other circuit court decisions on the subject and they are both consistent with the determination below:

> "Turning to authority we find that the only appellate authority that there is on the point supports the proposed intervenors' position. The two relevant cases are Union Carbide and Carbon Corporation v. Nisley, supra, in the Tenth Circuit, and York v. Guaranty Trust Co. of New York, supra, in our own Circuit. Misapplied ingenuity may find it possible to distinguish York on the facts, so that what Judge Frank thought of as his holding can be classified as dictum. It seems to us that the opinion in York is highly persuasive, if not binding."

There is no conflict of opinion between circuit courts which this court need resolve.

The Petitioners recognize that all of the appellate authority is against them. Therefore, again using "misapplied ingenuity" Petitioners try to show disparity of district court decisions. Differences in decisions in district courts even if they broadly existed, would give no ground for certiorari to the Supreme Court.

The only case to which Petitioners point which gives them any support is *Athas* v. *Day* (161 F. Supp. 916, D. Col. 1958), which was cited to the court below without provoking comment. It should be noted that the Court of Appeals which decided *Union Carbide and Carbon* v.

Nisley, 300 F. 2d 561 (10th Cir. 1961) discussed *Athas* v. *Day* then decided directly to the contrary. The case of *Husserl, Inc.* v. *Newman* (25 FRD 264, S. D. N. Y. 1960) referred to in the Petition, at page 19, is clearly distinguishable as the court in that case held intervention was timely and granted leave to intervene.

(c) No important state or territorial question has been decided in a way which is in conflict with applicable state or territorial law.

This case is brought under a federal statute to enforce rights of investors. It does not involve any state or territorial law.

(d) There is no important question involved of federal law which has not been, or should be, settled by this Court.

York v. *Guaranty Trust Co.*, 143 F. 2d 503, *rev'd on other grounds*, 326 U. S. 99, the *Union Carbide* case, and now this case, constitute a threesome of consistent decisions of circuit courts of appeal which settles the question.

Furthermore, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has presented a Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the United States District Court (34 FRD 385). Among the rules which it is proposed be clarified is Rule 23. If Rule 23 is amended any decision in this case would no longer be authority and accordingly there is no reason for this Court to accept this case for review. As Judge Friendly, in his concurring opinion below, said:

> "Hopefully, the necessity for such difficult determinations may be avoided by revision of Rule 23. See FN. 1 supra." (340 F. 2d 731, 736)

Inasmuch as there are three consistent decisions of Courts of Appeal and a pending proposal to amend Rule 23, there would seem to be no reason why this Court should consider this matter for the purpose of "settling" the law.

The revision of Rule 23 which is now proposed, would clarify the rule in a manner consistent with the decision below.

(e) There has been no decision below in conflict with applicable decisions of ths Court.

To our knowledge this Court has never spoken on the question involved and consequently the decision below cannot be in conflict with decisions of this Court.

(f) The decision below has not so far departed from the usual and accepted course of judicial proceeding as to call for the exercise of this Court's power of supervision.

The Securities and Exchange Commission was permitted to intervene below. The Commission supported the contentions of the Respondents and urged upon the court the decision which it made as being consistent with the purposes and policies of the securities laws.

If one or more persons institute a class action to enforce the liability under Section 11 of the Securities Act before the expiration of the statute of limitations, there is no sound reason why every member of the class should not thereafter be permitted to join that action even though the time for him to individually sue might have expired. The evidence on which the intervenors will rely to establish the falsity in the registration statement is only as old as that upon which the original parties will rely, and claims of additional parties will not upset the expecta-

tions of the defendants. The original action was brought on behalf of a defined and identifiable class and accordingly the defendants were then advised of the full extent of their possible liability. (See 76 Harvard Law Review, 1675-1679.)

The policies in favor of settling the claims of the entire class in a single litigation argue for considering this class action to be sufficiently representative in nature to "toll" the statute for the entire class. If each individual member of a class must bring independent suit in order to protect his claim against the running of the statute of limitations, his remedy may well be denied him.

The Securities Acts are remedial legislation and as such should be liberally construed to fully effectuate and eliminate the practices they were calculated to destroy.

Unless a liberal construction is given, not only to the cause of action given under Section 11 of the Securities Act, but also to the remedy created, a shelter will be erected for those who defraud investors.

By holding the class suit remedy to be available in actions such as the one at bar, and by holding that the statute of limitations is "tolled" by the institution of such an action, the purposes of the Securities Acts are best accomplished.

By and large, the vast majority of issuers of securities, and those who distribute them to the public, are meticulous in their disclosures. The national, commercial and industrial life is greatly dependent upon the maintenance of a securities market in which all can have confidence. The liberal construction of the securities laws not only aids the individual investor in the enforcement of his remedies, but aids in bringing to the general securities market the integrity which is essential to its effective functioning.

The decision below has not abrogated the statute of limitations. Respondents have never contended that they have been excused from complying with the statute of limitations. On the contrary, they state that they have complied with the statute by the timely institution of the class action on their behalf. The court below has not, as the Petitioners state, excused the intervenors from compliance with the statute of limitations.

No substantive right has been abridged, enlarged or modified as the Petitioners contend. The Petitioners have distorted the use of the word "tolling" to give the impression that the decision below has in some way changed the limitation periods contained in Section 13. This is not so. The court below has only held that these provisions were met by the timely institution of a class action. In order to give full recognition to the representative character of the action they hold that the statute of limitations is "tolled" for those in whose behalf the representative action is brought just as it is for those who actually brought it. This is not an abrogation, modification, or abridgement of any substantive right nor is it a tolling of the statute as the word is ordinarily used.

Whether the limitation provision in §13 of the Securities Act of 1933 is considered to be substantive or procedural, the Respondents' position is that it has been *met* by the institution of the action on behalf of the class. The rule is the same for the original plaintiffs and those who by intervention later become plaintiffs. Each must comply with the statute by establishing that he did not know, and by the exercise of reasonable diligence could not have discovered, the alleged falsity of the registration statement more than one year prior to the date of *the commencement of the action.*

The statutory limitation is not in any way, or to any extent, abrogated. All plaintiffs, including plaintiff-intervenors, will have to prove compliance with the time limitation in §13. However, they need only do so as of October 25, 1962, when the action was started and not as of May 13, 1964, when they sought to intervene.

There is nothing in the legislative history of Section 13 of the Securities Act which indicates that the decision of the court below is in any way contrary to Congressional intent.

Conclusion

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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June 8, 1965